Supreme Court, U.S.
FILED

No. 09-851 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

BEXAR COUNTY TEXAS; BEXAR COUNTY SHERIFF'S OFFICE; ROBERT O'DONNELL, in his Individual Capacity,

Petitioners,

v.

EARNEST LYTLE, Individually and as Representative of the Estate of Heather Lytle,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CLARKSON F. BROWN
Counsel of Record

LARRY L. ROBERSON

Bexar County Assistant Criminal District Attorneys – CIVIL DIVISION
300 Dolorosa, Suite 4049
San Antonio, Texas 78205
Telephone (210) 335-3918
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether an officer's use of deadly force is "objectively reasonable" under the Fourth Amendment when the officer attempts to terminate a high-speed pursuit by shooting at the suspect's car after the suspect collides with an oncoming vehicle, reverses and bears down on the officer, and then attempts to flee into a residential neighborhood at a time of day when the probable risk of further injury to innocent bystanders and other motorists is at its height.

2. Whether, on February 28, 2006, the law was so clearly established that a reasonable law enforcement officer would have known that the particular use of deadly force used to terminate a high-speed pursuit would violate the Fourth Amendment after he witnessed the suspect drive dangerously and recklessly, collide with an oncoming vehicle, reverse towards the officer as he stood outside of his cruiser, and then attempt to continue his reckless and dangerous flight through a residential neighborhood.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF FACTS	3
District Court Proceedings	10
Decision of the Fifth Circuit	11
REASONS FOR GRANTING THE PETITION	13
I. THE DECISION CREATES A SPLIT IN THE CIRCUITS BY CONCLUDING THAT OFFICER O'DONNELL'S DECISION TO USE DEADLY FORCE TO TERMINATE A DANGEROUS HIGH-SPEED PURSUIT COULD VIOLATE THE FOURTH AMENDMENT	14
II. THE FIFTH CIRCUIT OPINION IGNORES THIS COURT'S FIRMLY ESTABLISHED QUALIFIED IMMUNITY PRECEDENT	22
A. IN THE CONTEXT OF A HIGH-SPEED PURSUIT UNDER THE CIRCUMSTANCES OF THIS CASE, THE LAW WAS NOT SO CLEARLY ESTABLISHED THAT A REASONABLE OFFICER WOULD HAVE KNOWN THAT HIS CONDUCT WAS UNLAWFUL	23

TABLE OF CONTENTS – Continued

Page

B. EVEN IF THE LAW WAS CLEARLY ESTABLISHED IN THE CONTEXT OF A HIGH-SPEED PURSUIT UNDER THE CIRCUMSTANCES OF THIS CASE, THE MISTAKE AS TO WHAT IT REQUIRED WAS A REASONABLE ONE 30

III. THE RESOLUTION OF THIS CASE CARRIES WITH IT RESOLUTION OF VITALLY IMPORTANT ISSUES OF PUBLIC POLICY WHICH IMPLICATE PUBLIC SAFETY.... 33

CONCLUSION 34

APPENDIX

Circuit Court Opinion ..... App. 1

District Court Order ..... App. 33

Order Denying Rehearing ..... App. 49

TABLE OF AUTHORITIES

Page

UNITED STATES CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....25

Brosseau v. Haugen, 543 U.S. 194 (2004).....*passim*

Graham v. Connor, 490 U.S. 386 (1989).....*passim*

Hope v. Pelzer, 536 U.S. 730 (2002) 15

Malley v. Briggs, 475 U.S. 335 (1986).....24, 32

Saucier v. Katz, 533 U.S. 194 (2001).....*passim*

Scott v. Harris, 550 U.S. 372 (2007).....*passim*

Tennessee v. Garner, 471 U.S. 1 (1985)....13, 23, 29, 30

United States v. Place, 462 U.S. 696 (1983).....16

FEDERAL CASES

Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009).....25

Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996).....32

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002).....27, 28

Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000), *cert. denied*, 531 U.S. 874 (2000).....27

Smith v. Freeland, 954 F.2d 343 (6th Cir. 1992) 31

Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003).....17, 18, 28, 29

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bexar County Sheriff's Deputy Robert O'Donnell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009). It is reproduced in the Appendix at 1-32. The opinion of the District Court is reported as *Lytle v. Bexar County*, 543 F. Supp. 2d 656 (W.D. Tex. 2008). It is also reproduced in the Appendix at 33-48.

JURISDICTION

On February 23, 2009 the Fifth Circuit entered judgment and Deputy O'Donnell timely filed a petition for rehearing *en banc*. The Fifth Circuit entered an order denying the petition on October 6, 2009. (App. at 49). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF FACTS

At approximately three o'clock in the afternoon[1] on Tuesday, February 28, 2006, Bexar County Sheriff's Deputy Robert O'Donnell ("Deputy O'Donnell") responded to a non-emergency complaint from a woman claiming that her ex-boyfriend had threatened her.[2] During the interview, the complainant indicated that her ex-boyfriend was driving a primer-grey Ford Taurus, which was likely stolen. (App. at 2). Deputy O'Donnell contacted a detective in the Bexar County Sheriff's Office Auto Theft Unit and learned that the suspected driver, Mr. Charles Judy ("Judy"), was on bond for several charges including felony theft and unlawfully carrying a weapon. (App. at 2).

Fully aware of Judy's background, Deputy O'Donnell left the complainant's residence to search the surrounding neighborhood, contacting dispatch to alert units in the area to be on the lookout for the suspect vehicle. Shortly thereafter, Deputy O'Donnell spotted a primer-black Ford Taurus matching the description of the suspect vehicle parked in the driveway of a known drug location and parked his cruiser. (App. at 3). Approximately 15 minutes later, the Taurus left and Deputy O'Donnell followed. When the Taurus changed lanes without signaling, Deputy

---

[1] (USCA5 174; Exhibit A).

[2] According to Deputy O'Donnell, the complainant indicated that her ex-boyfriend had threatened to "blow up" her home and her grandfather's business. (USCA5 174).

O'Donnell activated his emergency lights and attempted to initiate a traffic stop. (App. at 3).

Rather than stop, the Taurus turned onto an adjacent street and raced away. (App. at 3). Deputy O'Donnell activated his emergency sirens and pursued the Taurus through a residential neighborhood at what Deputy O'Donnell "characterizes . . . as exceeding sixty-five miles per hour, while Lytle asserts . . . [was] 'well over' the thirty mile per hour speed limit." (App. at 3). Shortly into the high-speed pursuit, the driver of the Taurus sped through an intersection and attempted to make a high-speed right turn. (App. at 3). The driver lost control and flew into the oncoming traffic lane, colliding with a vehicle driven by James Briers with his 12-year-old daughter Jasmine Briers in the back seat. (App. at 3).

The pursuit momentarily ended as the Taurus came to a stop as a result of the collision and Deputy O'Donnell pulled his cruiser approximately "twelve-to-fifteen feet" behind the Taurus. (App. at 3). Deputy O'Donnell exited his cruiser and drew his service revolver as he took a position of cover. At some point during the melee, the Taurus collided with Deputy O'Donnell's cruiser.[3] Deputy O'Donnell and each of the independent civilian eye-witnesses present at the

---

[3] The District Court incorrectly noted that the parties disputed whether the Taurus actually struck Deputy O'Donnell's cruiser. (App. at 35, n.1). Mr. Judy did not dispute a collision, only that he was at fault. (USCA5 462-463). The photographic evidence contained in the record is clear. (USCA5 420-428).

scene consistently agreed that a collision occurred after the Taurus reversed from the wreckage towards Deputy O'Donnell. On the other hand, Judy asserted that Deputy O'Donnell's cruiser struck the Taurus from the rear, apparently before he reversed towards the parked cruiser.[4] In any event, after Deputy O'Donnell exited his cruiser, the Taurus immediately reversed towards him and then changed course and raced away in the opposite direction, further into the neighborhood. (App. at 5).

The disputed fact the Court of Appeals found as a material fact sufficient to deny summary judgment centered on at what point Deputy O'Donnell fired two rounds from his service revolver into the body of the Taurus. According to Deputy O'Donnell, as he was standing outside of his cruiser with his weapon drawn, the Taurus reversed from the collision with James Briers' automobile towards him. (App. at 4). He then fired his service revolver simultaneously as the Taurus rammed into his cruiser. (App. at 41).

Disputing his testimony were three witnesses, each indicating that the shots may have been fired immediately after the Taurus rammed into Deputy O'Donnell's cruiser and while the Taurus was moving away from the collision. The District Court and Court of Appeals credited the statements of a passenger in the Taurus who guessed the distance was "two, three houses away" but the same witness equivocated when

---

[4] (USCA5 462-463).

asked to clarify: "I can't say three or four, I mean I can't really judge but I know we were already driving away."[5]

Ultimately, Judy was able to escape from his encounter with Deputy O'Donnell and he continued on his reckless flight. Tragically, one of the shots fired by Deputy O'Donnell struck and killed Heather Lytle, a passenger in the back seat of the Taurus. A co-passenger noticed that Ms. Lytle was seriously injured and begged Judy to get her help, but his pleas fell on deaf ears as Judy continued his dangerous attempt to evade arrest.[6] Deputy O'Donnell returned to his cruiser in order to continue the pursuit but was unable to catch up to Judy. (App. at 4). At some point thereafter, Judy crashed into a "car port" bringing his life-threatening flight to an end. (App. at 4). Another deputy apprehended Judy after he tried to escape on foot. (App. at 4).

The clearest and most consistent version of the events on that day came from neither Deputy O'Donnell nor Judy, but rather from the independent civilian eye-witnesses who watched the maelstrom of events unfold. While video evidence of the pursuit was unavailable, these independent eye-witness accounts,

---

[5] (USCA5 444).

[6] Transcript of recorded statements of Taurus passenger Steven Brian Davis: " . . . I kept telling him to stop, stop, stop, stop, you know? I said this girls shot, you need to just (inaudible) you gotta do something, man, she's shot, you need to stop . . . " (USCA5 445).

which were attached as evidence to the summary judgment motion, are no less compelling.[7]

Mr. Marcus Stewart as he stood in his yard approximately two houses away from the scene:[8]

> " . . . [T]here were several kids playing basketball at a home next door to mine. The basketball court is one that is located on the street curb. When the car was approaching my house it was driving fast and the kids had to get out of the way . . . " (Exhibit D; USCA5 194)
>
> . . .
>
> "I saw him make the turn and then I heard the crash when the gray car hit another car that was coming on Glen Fair . . . I saw the officer get out of the police car, and then I saw the car that was being chased throw it in reverse to clear the other car, and that's when he rammed the police car . . . The gray car got hung up on the police car briefly and then started to drive away. At the same time that the car started to drive away the officer shot twice at the car . . . " (Exhibit C; USCA5 192)

---

[7] Plaintiff relied on the very same witness statements as evidence that Deputy O'Donnell fired as Judy was traveling away from him.

[8] All errors appear as they were in original statements.

Mr. Briers, the unfortunate driver of the automobile Judy recklessly crashed into that afternoon:

> "[A] black in color car ran through the stop sign . . . he was coming too fast and veered over to my side and slammed right in the front of my car we both hit our breaks . . . I then looked back at my daughter who was in the car with me . . . I then looked forward and that's when I heard the policeman direct the driver . . . "
>
> . . .
>
> "Then I saw the car move backwards towards the policeman in his car. The policeman was outside his car telling them to stop the car, get out the car."
>
> . . .
>
> " . . . I then saw the car move backwards . . . I then told my daughter to get down and I put my body between her to shield her. The driver of the car then started to back into the police car I think it hit the car and I don't think there was any other way for the car to get out but was to ram the police car or my car . . . "
>
> . . .
>
> " . . . I was in fear for my life and the life of my daughter. I think right at the same time the driver rammed the police car the officer shot twice at the car. I think the officer did the right thing it seem right at the time there was just no other way for the officer to

> get out of the way. When he put the car in reverse it was right at the officer. Once he drove into the police car, the driver took off forward. . . . I could not actually see the driver of the car back into the police car . . . " (Exhibit E; USCA5 199)
>
> . . .
>
> " . . . There were a lot of kids around they were saying did you hear the shots and here is piece of brass from the officer gun. I don't know who the kids were there were a lot of kids around . . . " (Exhibit E; USCA5 200)

And again as a witness at Judy's criminal trial, Mr. Briers testified under oath:

> "Q: All right. Basically, to summarize your testimony, the vehicle that struck yours backed into the police vehicle and drove away as the shots were fired. Is that an accurate summary?
>
> A. He backed into the police officer at a pretty high rate of speed, there was debris everywhere, because the bumper of his car fell off and – you know, he had left the front of his bumper when he hit my car, and then I think the back of his bumper fell off when he hit the policeman's car. And somewhere in between that time there were shots fired.
>
> Q: But the vehicle struck your car, backed up, struck the police vehicle and fled away as shots were fired. Is that correct?

> A. Well, similar to that. I'm not exactly sure on the times of when the shots were fired, you know . . . " (Exhibit F; USCA5 203)

And finally, from 12-year-old Jasmine Briers's perspective from the backseat of her father's car:

> " . . . I was in the car with my father James Briers. My dad stopped with the brakes hard and a guy hit us. Behind the guy there were cops and he tried to back up and he hit the cops and then he put the so it could go forward and the cop got out and shot twice at the guy. He shot twice at the guy as the guy was driving away . . . " (Exhibit G; USCA5 206)

District Court Proceedings

The District Court reviewed the evidence of Judy's reckless and dangerous attempt to evade arrest. It considered the extreme and callous disregard for the lives of innocent bystanders as evidenced by Judy's collision with an oncoming vehicle. Presumably, it considered the fact that Judy would apparently stop at nothing to evade capture, going so far as to reverse his automobile at high-speed toward Deputy O'Donnell before speeding off into the neighborhood. Still, the District Court found that the grant or denial of qualified immunity hinged solely on the "direction and distance the suspect vehicle had traveled when Deputy O'Donnell discharged his weapon." (App. at 41).

Decision of the Fifth Circuit

Deputy O'Donnell appealed the District Court's denial of qualified immunity. The Fifth Circuit Court of Appeals panel of three affirmed, with Justice Jerry E. Smith dissenting. The Court of Appeals agreed with the District Court that the distance and direction of the Taurus was "essential to determining the extent of the threat that the Taurus actually posed – to both Deputy O'Donnell and the public in general – at the time O'Donnell fired." (App. at 16). The Court of Appeals buttressed its finding by disregarding any future threat the Taurus may have posed once it "was three to four houses away" from Deputy O'Donnell. (App. at 7; App. at 24).

Instead, the panel's majority focused solely on the state of events at the very moment Deputy O'Donnell fired his weapon. (App. at 7). Reviewing the facts in the light most favorable to the plaintiff, the panel noted that at the moment Deputy O'Donnell fired, the Taurus was moving away from him and accordingly, he was in no danger. Additionally, the Court of Appeals inexplicably found that if, as plaintiff alleges, the Taurus was a short distance away from Deputy O'Donnell when he fired his weapon, a reasonable jury could conclude that it no longer represented a threat to other bystanders, motorists or officers. (App. at 24). Tellingly, the Court of Appeals noted "there were no children or bystanders in the path of the vehicle, indicating that no one was in immediate danger." (App. at 25).

Apparently relying on its finding that a reasonable jury could find that the Taurus no longer represented a threat, the panel surmised that "it has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." (App. at 27). The Court of Appeals then summarily concluded that the right alleged to have been violated was "clearly established on February 28, 2006 . . . " and ended its consideration of the qualified immunity issue. (App. at 27).

With a vigorous dissent, Justice Jerry E. Smith argued that the panel had ignored this Court's clear direction in *Scott v. Harris*, 550 U.S. 372 (2007), writing that under the circumstances faced by Deputy O'Donnell, it made "no difference if the dangerous suspect was three or four houses away instead of backing toward the officer [when he fired his weapon]. The obvious risk to the public was the same." (App. at 31).

Deputy O'Donnell timely filed a petition for rehearing *en banc* based on the panel's apparent disregard of this Court's decision in *Scott*. The vote not to grant rehearing divided at 5-11, with Chief Justice Edith H. Jones siding with the minority. (App. at 50).

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted because the Fifth Circuit opinion conflicts with this Court's opinion in *Scott*, and a majority of the circuits deciding the same issue thereafter. In addition, the facts of this case work to further define, in a substantial and meaningful way, a difficult and relatively unexplored area of Fourth Amendment jurisprudence. Namely, whether the Fourth Amendment is offended when an officer uses deadly force at a level "nearly certain" to cause death or serious injury to the suspect in an effort to terminate a high-speed pursuit after the suspect places other motorists, officers, and innocent bystanders at extreme risk of death or serious bodily injury and evidences an unequivocal intent to escape at any cost. This proposition has yet to be addressed by this Court in the wake of *Scott*.

Additionally, a writ of certiorari is warranted because the Court of Appeals' opinion conflicts with this Court's express direction in *Brosseau v. Haugen*, 543 U.S. 194 (2004), by concluding that the right alleged to have been violated by Deputy O'Donnell was "clearly established" at the time of the incident without reference to the underlying facts of the case, instead relying only on the general tests set out in *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Finally, vitally important issues of public safety are at stake if this opinion is left to stand. The Court

of Appeals' opinion sends a clear message to law enforcement officials that the bar for the use of deadly force in the context of high-speed pursuits is impossibly high. Further, officers who mistake the level of deadly force required to terminate a dangerous high-speed pursuit, even if a clear danger to the public exists and though it may be a reasonable one, will be given no quarter.

I. THE DECISION CREATES A SPLIT IN THE CIRCUITS BY CONCLUDING THAT OFFICER O'DONNELL'S DECISION TO USE DEADLY FORCE TO TERMINATE A DANGEROUS HIGH-SPEED PURSUIT COULD VIOLATE THE FOURTH AMENDMENT

The Court of Appeals found the sole fact weighing against qualified immunity was the distance and direction of the car when Deputy O'Donnell discharged his weapon. Crediting the plaintiff's version that the Taurus was "three to four houses away" when Deputy O'Donnell fired, the Court of Appeals concluded that a reasonable jury could find that any threat the Taurus posed had sufficiently dissipated. (App. at 24-25). In so finding, the Court of Appeals ignored the direction provided by this Court's opinion in *Scott* and created a split with a majority of the circuits addressing the issue after *Scott* by rejecting the proposition that a court must consider the *probability* of risk that suspect presents, even if that risk is to an as yet unidentified and unharmed public.

In resolving questions of qualified immunity, this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), established a two-part qualified immunity inquiry. The first part considers whether the plaintiff's allegations, if true, establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (*citing Saucier*, 533 U.S. at 201). Claims alleging the use of excessive force during a seizure are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

The reasonableness of an officer's actions during the seizure of a suspect under the Fourth Amendment is not easy to define nor is it subject to "mechanical application" but requires careful consideration of the facts and circumstances of the particular case. *Id.* at 396. Important facts to consider include: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*

Courts considering the reasonableness of a particular use of force should do so from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* This approach allows for the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation. *Id.* at 397.

Reasonableness under the Fourth Amendment is ultimately determined by striking a balance between "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott*, 550 U.S. at 383 (*citing United States v. Place*, 462 U.S. 696, 703 (1983)); *Graham,* 490 U.S. at 396. Weighing heavily in the balancing test is the number of lives potentially at risk and the relative culpability of those threatened. *Scott*, 550 U.S. at 384.

This Court applied this balancing approach in *Scott*, concluding that an officer acted reasonably when he terminated a car chase by ramming the bumper of a fleeing car. *Id.* at 384. In so finding, the Court weighed the "actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase" against the life of the suspect in light of the fact that ramming "posed a high likelihood of serious injury or death." *Id.*

Ultimately, this Court struck a balance between "the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person." *Id.* After considering the culpability of the suspect and innocence of the bystanders and officers, this Court decided the balance weighed in favor of reasonableness when it was the suspect who was guilty of "unlawfully engaging in the reckless, high-speed flight

that ultimately produced the choice between two evils that [the officer] confronted." *Id.*

An important consideration in *Scott* was the threat posed to the suspect by the officer's particular use of force. While pushing the bumper of the suspect posed a "high likelihood" of serious injury or death, it did not represent the "near certainty of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist." *Id.* To highlight the difference, this Court noted the "near certainty" of serious injury or death represented by an officer pulling alongside and shooting at a fleeing truck. *Id.* (*citing Vaughan v. Cox*, 343 F.3d 1323, 1326-1327 (11th Cir. 2003)).

But nothing in *Scott* can be read to foreclose the possibility that under some circumstances, an officer's act of firing his weapon at a fleeing motorist's car to terminate a high-speed pursuit could be consistent with the Fourth Amendment. Nor did the court in *Vaughan* conclude that an officer would always violate the Fourth Amendment by attempting to terminate a dangerous high-speed pursuit in the same manner.

Rather, the *Vaughan* court concluded only that under the plaintiff's version of facts, a reasonable jury could find that an officer's act of pulling alongside a fleeing vehicle and opening fire could be unconstitutional. *Vaughan,* 343 F.3d at 1330. There, the roadway was apparently clear of traffic and nothing in the record indicated that the suspects had

"menaced or were likely to menace others at the time of the shooting." *Id.* Instead, "[the suspect] made no aggressive moves to change lanes before [the officer] fired . . . [and] according to [the passenger], the collision between the truck and [the officer's] cruiser was both accidental and insufficient to cause [the officer] to lose control." *Id.*

The instant case required the Court of Appeals to consider whether an officer's use of deadly force to terminate a high-speed pursuit violated the Fourth Amendment where the stakes were far graver in terms of threat to life represented by the fleeing suspect as well as the force exercised by Deputy O'Donnell. Rather than applying a push-bumper to the rear of a fleeing automobile, Deputy O'Donnell fired his service revolver while standing outside of his cruiser in an attempt to terminate a clearly dangerous high-speed pursuit. Counter-balancing Deputy O'Donnell's heightened response, the threat to the public, other officers and to Deputy O'Donnell himself that Judy represented.

Unlike the record in either *Vaughan* or *Scott*, here the record clearly reflected that Judy represented the greatest probability of harm to others and had already placed another motorist and his daughter at substantial risk of death or bodily injury by colliding with their oncoming vehicle. A collision occurred between Judy's car and Deputy O'Donnell's cruiser, though Judy claimed Deputy O'Donnell was at fault. In addition, Judy reversed direction towards Deputy O'Donnell as he stood outside of his cruiser

with his weapon drawn. Judy then reversed course again and raced away and further into the neighborhood.

Rather than a midnight pursuit or flight down an interstate highway clear of traffic, Judy's flight was through a residential neighborhood at breakneck speeds shortly before five o'clock on a Tuesday afternoon.[9] Critically, a time of day when children are most likely to be at play and when mothers and fathers are most likely to be returning home from the workday.

Importantly, in *Scott* it was not the immediate presence of motorists, bystanders or other officers which guided this Court's decision. At the moment the officer attempted to terminate the high-speed chase, no pedestrians or other motorists were present nor were other officers involved in the chase. Indeed, viewing the video evidence there were no pedestrians present at all, and none likely to be strolling the highways during the midnight hours for the suspect to encounter. Rather, this Court's concern was for *the safety of those individuals who* ***might*** *have been harmed if the chase continued.*

When considering those who might have been at risk, it is certainly reasonable, if not necessary, for a court to consider the average neighborhood at the same time of day after *Scott*. Neighbors walking their

---

[9] (USCA5 174; Exhibit A).

dogs and checking their mail, children at play, as was the case here, and traffic thick as mothers, fathers, and neighbors return home from the business of the day. Like most neighborhoods, a possible beehive of activity at a time when the probability of harm to innocent bystanders who might be caught completely unaware is exponentially greater. Rather than a mere possibility of serious injury, the time and location of the pursuit very nearly guaranteed it, and to many without benefit of even the limited protection provided by the buffer of an automobile.

Here, the record shows by the uncontradicted witness statements alone that at least three innocent bystanders were in the immediate vicinity. Two of those witnesses noted the presence of children in the area, which the Court of Appeals apparently credited. (App. at 24). According to the undisputed testimony of one witness, children were playing curb-side basketball as the Taurus roared through the neighborhood.[10] Judy had already placed the lives of at least two innocent persons, both driver and his 12-year-old daughter, at grave risk of serious injury when he lost control and collided with their vehicle. Rather than stop his dangerous and life-threatening attempt to evade after ramming into an innocent motorist, Judy reversed his car towards Deputy O'Donnell and sped off further into the neighborhood to continue his reckless and dangerous high-speed flight.

---

[10] (USCA5 194; Exhibit A).

In sum, Judy took the high-speed pursuit into a residential neighborhood at a time when the likelihood of the presence of bystanders was nearly certain and the risk of harm to others had reached its height. Throughout the duration of his reckless attempt to evade arrest, Judy had shown no regard for the safety of officers, innocent bystanders or other motorists. From Deputy O'Donnell's perspective, he had no reason to believe that Judy would suddenly cease his reckless and dangerous conduct as he fled away at a high rate of speed.

Standing outside of his cruiser and armed only with his service revolver, Deputy O'Donnell wrongly assumed the chase was over. Suddenly, new life was breathed into the pursuit when Judy slammed the car into reverse and bore down on Deputy O'Donnell. Judy then reversed course again, and attempted to speed off in the opposite direction. Additionally, Deputy O'Donnell was fully aware of Judy's criminal background and the possibility that Judy might be armed, considering he was already on bond for unlawfully carrying a weapon.

It was at a point during these events that Deputy O'Donnell was forced to make a split-second decision based on what he knew of Judy and what he had seen from Judy up until the point he fired his weapon. Deputy O'Donnell was left with two choices: 1) he could act and hopefully prevent further injury to others with the only means at his disposal; or, 2) he could do nothing, return to his cruiser to give chase, and take the chance that Judy would further injure other motorists, innocent bystanders, or fellow officers

duty-bound to assist in his apprehension. The second choice is not one an officer is bound to choose. *Scott*, 550 U.S. at 385. ("We are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger.").

Considering all of the facts in the light most favorable to the plaintiff, only one conclusion remains: Judy presented the greatest risk of death or serious bodily injury to others at a time when the probability of such injury was at its zenith, and he had proven it by colliding with an innocent motorist and his daughter. Clearly, the safety of the innocent lives at risk through no fault of their own should weigh far heavier than that of an individual who would knowingly and intentionally place others in harm's way. From Deputy O'Donnell's viewpoint, Judy was a clear danger to others and he acted accordingly. Though the death of Heather Lytle is tragic, the fault lies squarely with Judy. For the above reasons, the actions of Deputy O'Donnell were objectively reasonable under the Fourth Amendment.

II. THE FIFTH CIRCUIT OPINION IGNORES THIS COURT'S FIRMLY ESTABLISHED QUALIFIED IMMUNITY PRECEDENT

The Court of Appeals' decision ignored this Court's qualified immunity precedent by finding that the law was clearly established at the time of the underlying incident by relying only on the general

tests set out in *Graham* and *Garner*. Most importantly, if indeed the law was clearly established, the Court of Appeals' analysis stopped short of fully considering whether Deputy O'Donnell was entitled to qualified immunity by failing to address whether Deputy O'Donnell's mistake as to what the law required was a reasonable one. The Court of Appeals' opinion should be reversed to prevent precedent being established that lower courts could decide the issue without meaningful consideration. Only this Court can make clear the importance of qualified immunity to the public and to the law enforcement community and that the issue must be fully and fairly considered before a decision is reached.

A. IN THE CONTEXT OF A HIGH-SPEED PURSUIT UNDER THE CIRCUMSTANCES OF THIS CASE, THE LAW WAS NOT SO CLEARLY ESTABLISHED THAT A REASONABLE OFFICER WOULD HAVE KNOWN THAT HIS CONDUCT WAS UNLAWFUL

When a reviewing court finds that the plaintiff's version of the facts establish a constitutional violation, then it should next determine if the right was clearly established. *Scott*, 550 U.S. at 377 (*citing Saucier*, 533 U.S. at 201). In deciding if a right is clearly established, the question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

Before it can be clear to a reasonable officer that his actions are unlawful, the law must first provide notice of the unlawfulness of the particular conduct at issue. *Id.* If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *Id.* Ultimately, qualified immunity works to "protect officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* at 205-206 (internal quotation and citation omitted).

Additionally, the second part of the *Saucier* analysis recognizes "that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* at 205. Even if the law is clearly established, qualified immunity shields an officer from suit when he "makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Brousseau*, 543 U.S. at 198 (*citing Saucier*, 533 U.S. at 206). Importantly, the qualified immunity doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In its decision, the Court of Appeals concluded that a reasonable jury could find that the Taurus presented an insufficient risk of harm after it was a short distance from Deputy O'Donnell. (App. at 24). Accordingly, it held that the law was sufficiently well-established that a reasonable officer would have

known "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." (App. at 27). Rather than make its determination of whether the right at issue was clearly established after a consideration of Deputy O'Donnell's qualified immunity claim in light of the specific context of this case, the Court of Appeals found clear warning in the general tests set forth in *Graham* and *Garner*. (App. at 27).

This Court has expressly disavowed such an approach. *Saucier*, 533 U.S. at 201; *Brousseau*, 543 U.S. at 199. To simply allege a violation of an abstract right without reference to the specific facts of a case would be to "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The Court of Appeals' opinion expressed a clear and unequivocal preference for a jury to weigh the issues present in this case. (App. at 12). To do so is to assure that the defense of qualified immunity is "effectively lost." *Saucier*, 533 U.S. at 201.

Rather than a finding that the law was clearly established, a reasonable assessment of the issue would reveal that in the context of high-speed pursuits, courts still continue to struggle with the application of deadly force under circumstances similar to the instant case. *See Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009) ("the law in our circuit and elsewhere has been vague on whether the potential

risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death . . . "). Far from being clearly established at the time of the incident, the question of whether an officer's actions violated the Fourth Amendment in the context of high-speed pursuits was often a narrow one and turned on careful consideration of the specific facts of a given case in light of the developed body of law. *See Saucier*, 533 U.S. at 201.

Most notably, here the Court of Appeals found that only the distance and direction weighed against Deputy O'Donnell. (App. at 16). However, no case had ever established, clearly or otherwise, that when a fleeing suspect in a dangerous high-speed automobile pursuit reaches a certain distance away from an officer, the officer violates the Fourth Amendment by firing his weapon. In addition, few courts had considered the application of deadly force at a level "nearly certain" to cause death to the suspect on facts similar to those presented here: specifically, in the wake of the suspect's collision with an innocent motorist and after a renewed effort by that suspect to flee immediately thereafter.

Though, on lesser facts this Court and several of the circuits considering cases with similar facts have generally upheld the officer's use of force in the context of high-speed pursuits. In *Brosseau v. Haugen*, 543 U.S. 194 (2004), this Court determined the law was not so clearly established at the time that an officer would have known that to fire at an otherwise unarmed suspect would violate the Fourth

Amendment where the officer reasonably believed the moving vehicle posed a danger to police or others. Importantly, at the time the officer fired, no actual injury to bystanders had occurred, and the suspect had barely begun his attempt to flee. *Id.* at 196-197. Evidence of the danger Judy represented was far more developed here.

In *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000), *cert. denied*, 531 U.S. 874 (2000), with facts virtually indistinguishable from the present case, an officer fired at a fleeing motorist engaged in a high-speed attempt to evade arrest but injured a passenger instead. There, the suspect drove recklessly at high speeds, but no other motorists had been harmed (though one was forced to pull off the road). *Id.* at 872. The chase seemed to be at an end when the suspect collided with a guardrail and the officer approached the suspect's car. *Id.* When the suspect revived his attempt to flee, he drove towards the officer causing him to get out of the way. *Id.* The suspect then continued in the direction of approaching units and other motorists and the officer fired his weapon. *Id.* At the moment the officer fired, however, the direction of the suspect's flight was opposite the officer and apparently, no bystanders, motorists, or other officers were in immediate danger. *Id.* Still, that court found that the actions of the officer did not violate the Fourth Amendment. *Id.* at 878.

In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002), the Eleventh Circuit Court of Appeals upheld the use of force against a fleeing suspect where the

suspect would have appeared to "reasonable police officers to have been gravely dangerous" at the time of the shooting. *Id.* at 1281. There, immediately before the shooting the suspect had been driving recklessly, swerved at officers, had run through a homeowner's yard, and *almost* hit an oncoming motorist. *Id.* at 1277. When the chase paused, officers surrounded the suspect on three sides but the suspect remained in his car with the engine running and a clear path of escape.

Immediately, an officer fired two rounds through the front window when the suspect began to move and five more thereafter. *Id.* at 1278. A witness claimed to have observed the events at the time of the shooting and indicated that the suspect did not appear to be a danger to officers on the scene. *Id.* at 1279. Still, that court found that the actions of the officer did not violate the suspect's Fourth Amendment rights. *Id.* at 1282. Importantly, though the witness claimed that when the officer fired his weapon the suspect did not represent a danger to the officer or others, the court primarily relied on the events which occurred during the pursuit and preceded the shooting to conclude that the officer acted reasonably. *Id.* at 1280-1281.

On the other hand, there were instances preceding the instant case where the actions of an officer who attempted to terminate a high-speed pursuit by the use of deadly force could have violated the Fourth Amendment rights of the suspect. *Vaughan*, 343 F.3d at 1330. In *Vaughan*, the officers pursued the

suspects in an early morning high-speed chase down an interstate highway. *Id.* at 1325-1326. At the time the officer fired, the suspects "had not menaced nor were likely to menace others on the highway" and the suspects made no aggressive moves towards the officer when he pulled alongside their truck. *Id.* at 1330. Under the suspect's version of the facts, the officer faced nothing more than "two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone." *Id.* Accordingly, since there was no immediate threat to the officer or others, the court determined that the actions of the officer could have violated the suspect's Fourth Amendment rights. *Id.* at 1331.

Properly synthesized, the above cited cases and the law at the time of the incident clearly established only one principle: that the use of deadly force to prevent the escape of all felony suspects under any circumstances was constitutionally unreasonable. *See Brosseau,* 543 U.S. at 197 (*citing Garner,* 471 U.S. at 11). However, equally clear was that where an officer had "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" deadly force was constitutionally reasonable. *Id.* at 197-98 (*quoting Garner*, 471 U.S. at 11).

Indisputably, here Deputy O'Donnell had ample reason to believe that Judy represented a significant threat to others, considering he witnessed obvious evidence of Judy's dangerousness unfold as Judy lost

control of his vehicle and collided with an innocent motorist, reverse towards Deputy O'Donnell, reverse again and speed away. Even though Deputy O'Donnell had cause to believe his actions were necessary for the preservation of life and the safety of the public, the Court of Appeals gave short shrift to the matter by stamping its analysis closed with only a passing reference to *Graham* and *Garner*. It is this Court alone who can again make clear that the qualified immunity analysis cannot end so prematurely.

B. EVEN IF THE LAW WAS CLEARLY ESTABLISHED IN THE CONTEXT OF A HIGH-SPEED PURSUIT UNDER THE CIRCUMSTANCES OF THIS CASE, THE MISTAKE AS TO WHAT IT REQUIRED WAS A REASONABLE ONE

Even if the law were clearly established, qualified immunity still allows for an officer to have a reasonable but mistaken belief as to what it required. *Saucier*, 533 U.S. at 205. Here, the Court of Appeals' analysis begins and ends by concluding the law was clearly established without consideration of whether Deputy O'Donnell's mistake was a reasonable one.

As the dissent pointed out, even if the facts were as plaintiff alleged and Judy were at most three to four houses away, he still represented a significant threat of harm to others, if not to Deputy O'Donnell, then certainly to anyone unfortunate enough to cross his path. High-speed pursuits always represent a high degree of risk of injury to officers involved in the

chase, bystanders, and other motorists. *See Scott*, 550 U.S. at 382, n.9. To conclude that a fleeing suspect represents an insufficient threat of harm would be to ignore that by the very fact of the reckless and dangerous attempt to evade arrest by high-speed flight, a very real and significant threat of serious injury to the general public is present. *Id.*; *see also*, *Smith v. Freeland*, 954 F.2d 343, 347 (6th Cir. 1992) (recognizing that a car can be a deadly weapon). Framed in the context of the time, place and manner of Judy's flight, the risk of harm to others was arguably at its highest level.

In addition, it would be difficult for any reasonable officer to dismiss the fact that Judy had already proven he constituted an actual and significant threat. Forgetting for a moment that Judy reversed directions in his car and bore down on Deputy O'Donnell while he stood outside his cruiser, one vitally important fact remains. That is, Deputy O'Donnell's decision to fire his weapon in an attempt to terminate the high-speed pursuit followed immediately after he watched Judy lose control of his car and collide with an innocent motorist, then attempt to race off again into the surrounding neighborhood. This fact alone takes this case out of the realm of probability and possibility and places it squarely into one of certainty.

There is no question that a car can be a deadly weapon and when a suspect is using it to hasten his escape, even more so. Here Judy's path to freedom lie directly through an innocent motorist and his

daughter. Though he may not have intended to harm anyone, he is no less dangerous after having done so. Up until the point Deputy O'Donnell fired his weapon, it would have been abundantly clear to any reasonable officer on the scene that Judy would continue his dangerous and reckless attempt to evade arrest until he was no longer able.

Under what were chaotic circumstances and with only a few seconds to act, Deputy O'Donnell made a choice while standing outside of his cruiser to fire his weapon. The law does not require that Deputy O'Donnell make the best of all possible choices, only that his chosen course be a reasonable one under the circumstances. *See Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996). Though others might debate the soundness of Deputy O'Donnell's decision, it was one with which "officers of reasonable competence could disagree." *Malley*, 475 U.S. at 341. If Deputy O'Donnell was mistaken in his belief as to what the law required, his mistake was a reasonable one. The lower courts should have considered this aspect of the qualified immunity analysis, and in the future, courts should know they must if the defense of qualified immunity is to remain truly meaningful.

III. THE RESOLUTION OF THIS CASE CARRIES WITH IT RESOLUTION OF VITALLY IMPORTANT ISSUES OF PUBLIC POLICY WHICH IMPLICATE PUBLIC SAFETY

Officers are now on notice, at least in the Fifth Circuit, that use of deadly force is at their own peril and it is the innocent public who must finally bear the cost. Here, Deputy O'Donnell acted after he witnessed the suspect collide with an innocent motorist and then attempt to continue his reckless and dangerous flight. From Deputy O'Donnell's perspective, the circumstances he faced virtually guaranteed that if the pursuit continued, the lives of other motorists, bystanders, and fellow officers would be placed at substantial risk of death or serious bodily injury, though the Court of Appeals disagreed.

In the bulk of the excessive force claims arising from high-speed pursuits after this Court's pronouncement in *Scott*, most often lower courts are tasked with determining the point at which an officer's actions become inconsistent with the Fourth Amendment in the absence of any actual harm. Indeed, often law enforcement officials act preemptively in order to prevent a suspect from inflicting potentially grave and life-threatening injury on an innocent and unsuspecting public, a goal this Court endorsed in *Scott*. The Court of Appeals' holding works to undermine this goal by restricting an officer's use of deadly force even after he witnesses a fleeing suspect wreak havoc on another motorist and then continue his dangerous attempt to escape. The

message is clear: potential risk to the public is insufficient justification for preemptive action to terminate a high-speed pursuit by the use of deadly force nearly certain to cause death or serious injury to the suspect, regardless of the underlying circumstances.

CONCLUSION

There is little doubt that in light of the circumstances of this case, the danger was more than probable, it was imminent – and proven. With little imagination, one need only picture Judy wildly careening through the streets at the end of the work day to fully appreciate the level of risk presented by his reckless flight on that afternoon. Given these circumstances, Deputy O'Donnell acted to prevent further risk to the lives of the innocent public with whom Judy's path would inevitably intersect. Still, the Fifth Circuit had no trouble finding that the balance tipped in favor of Judy, and it did so without even a full consideration of whether Deputy O'Donnell was entitled to the defense of qualified immunity.

High-speed flight by a suspect intent on avoiding escape represents a special kind of threat to the public. As always, the circumstances very much determine the level of risk that a fleeing suspect presents, but the longer the chase, the more likely it is that innocent motorists, bystanders and other

officers will be injured as a result. If a suspect attempts to flee during the late hours of the night, as is often the case in the reported decisions, then an officer has more time within which to act and perhaps should be required to more carefully consider the decision.

But where a suspect attempts to flee under circumstances similar to those presented here, at a time and place which guarantees a significant number of potential victims, an officer should be given the discretion to act and act decisively, though he may err. Therein lies the importance of this Court's consideration of this case on the merits, for the law enforcement community and the public in general. That is, under what circumstances, if ever, may an officer terminate a high-speed pursuit by the use of deadly force nearly certain to cause the death or serious injury to the suspect?

While this case presents an opportunity for this Court to further define an area of the law it began to solidify in *Scott*, it also calls out for a full and fair review of whether Deputy O'Donnell was entitled to qualified immunity. Here, the interests of Deputy O'Donnell and the citizens of Bexar County lie in favor of a full consideration of the issue of qualified immunity. However, the interests of the public and the law enforcement community nationwide lie in favor of this Court granting certiorari review.

For the foregoing reasons, Deputy O'Donnell respectfully requests that the decision of the Fifth

Circuit Court of Appeals denying qualified immunity be summarily reversed, or alternatively, that a writ of certiorari be granted.

Respectfully submitted,

CLARKSON F. BROWN
Counsel of Record

LARRY L. ROBERSON

Bexar County Assistant Criminal
District Attorneys – CIVIL DIVISION
300 Dolorosa, Suite 4049
San Antonio, Texas 78205
Telephone (210) 335-3918
Attorneys for Petitioners

ERNEST LYTLE, Individually and as Representative of the Estate of Heather Lytle, Deceased, Plaintiff-Appellee

v.

BEXAR COUNTY, TEXAS; BEXAR COUNTY SHERIFF'S OFFICE; ROBERT O'DONNELL, in his Individual Capacity, Defendants-Appellants

No. 08-50217

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

561 F.3d 404

February 23, 2009, Filed

COUNSEL: For ERNEST LYTLE, Individually and as Representative of the Estate of Heather Lytle, Deceased, Plaintiff-Appellee: Sonia M. Rodriguez, Branton & Hall, San Antonio, TX.

For BEXAR COUNTY TEXAS, BEXAR COUNTY SHERIFF'S OFFICE, ROBERT O'DONNELL, in his Individual Capacity, Defendant-Appellants: Clarkson F. Brown, District Attorney's Office for the County of Bexar, San Antonio, TX.

JUDGES: Before SMITH, BARKSDALE, and PRADO, Circuit Judges. JERRY E. SMITH, Circuit Judge, dissenting.

OPINION BY: PRADO

OPINION

PRADO, Circuit Judge:

Bexar County Sheriff's Deputy Robert O'Donnell ("O'Donnell") fired his sidearm at the rear of a vehicle, striking and killing fifteen-year-old passenger Heather Lytle. Heather Lytle's father, Ernest Lytle ("Lytle"), brought suit individually and on behalf of his daughter's estate against Bexar County, the Bexar County's Sheriff's Office, and O'Donnell, alleging violations of Heather Lytle's civil rights. O'Donnell moved to dismiss the suit against him on the basis of qualified immunity. The district court denied this motion, and O'Donnell now brings this interlocutory appeal. Because genuine issues of material fact preclude a determination of qualified immunity, we dismiss this appeal.

I. BACKGROUND

A. *Factual Background*

On February 28, 2006, O'Donnell responded to a report that a complainant's ex-boyfriend had made threats of violence against her. The complainant stated that her ex-boyfriend was driving a stolen, primer-grey Ford Taurus. O'Donnell contacted a detective in the county auto theft unit and learned that the ex-boyfriend was a known car thief. O'Donnell also learned that the ex-boyfriend was on bond for charges of felony theft and unlawfully carrying a weapon. O'Donnell later spotted a primer-black Ford Taurus – a possible match to the ex-boyfriend's vehicle – at a

known drug location. After the Taurus left the location, O'Donnell began to follow it.

Shortly after O'Donnell began following the Taurus, it changed lanes without signaling. O'Donnell activated his emergency lights in an effort to initiate a traffic stop. Instead of stopping, the Taurus turned right and began to accelerate. O'Donnell activated his siren and pursued the Taurus for a quarter-to-half mile. O'Donnell characterizes the chase as exceeding sixty-five miles per hour, while Lytle asserts that the speed was "well over" the thirty mile per hour speed limit. After this brief chase, the Taurus attempted to make a right turn, but it took the turn too widely and collided with a vehicle in the oncoming lane. The Taurus came to a stop and O'Donnell pulled his police cruiser twelve-to-fifteen feet behind the Taurus. The Taurus then began backing up toward O'Donnell's police cruiser.

The parties dispute what exactly happened next. In any event, sometime after O'Donnell stopped his police cruiser, he twice fired at the rear of the Taurus. Heather Lytle was sitting in the center of the back seat of the vehicle, and one of the shots struck and killed her. After firing, O'Donnell returned to his police cruiser and continued the pursuit. Upon later crashing the Taurus into a car port and fleeing on foot, the driver of the Taurus was apprehended.

B. Procedural Background

Lytle brought suit against O'Donnell, Bexar County, and the Bexar County Sheriff's Department, alleging, *inter alia,* that O'Donnell violated Heather Lytle's constitutional rights by unreasonably seizing her in violation of the Fourth Amendment. O'Donnell filed a motion to dismiss on the basis of qualified immunity. Because O'Donnell had referenced material outside the pleadings, the district court treated his motion as one for summary judgment. *See* FED. R. CIV. P. 12(d).

The district court ultimately concluded that a genuine issue of material fact precluded granting summary judgment on qualified immunity. The district court found that the parties genuinely disputed the direction and distance that the Taurus had traveled at the moment O'Donnell fired: O'Donnell asserted that he fired as or immediately after the Taurus backed up toward him, but Lytle contended that the Taurus was three or four houses down the block when O'Donnell fired. The district court indicated that O'Donnell would be entitled to qualified immunity were the facts as he alleged – implying that O'Donnell would not be entitled to qualified immunity were the facts as Lytle alleged – but stated that O'Donnell's entitlement to qualified immunity hinged on the resolution of this factual issue. The district court thus found a genuine issue of material fact that would have to be resolved by the factfinder and denied O'Donnell's motion. O'Donnell filed this interlocutory appeal.

II. JURISDICTION AND STANDARD OF REVIEW

"The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine 'to the extent that it turns on an issue of law.'" *Flores v. City of Palacios,* 381 F.3d 391, 393 (5th Cir. 2004) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Where the district court has determined that genuine issues of material fact preclude a determination of qualified immunity, we have jurisdiction only to address the legal question of whether the genuinely disputed factual issues are material for the purposes of summary judgment. *See Wagner v. Bay City,* 227 F.3d 316, 320 (5th Cir. 2000) ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness.*"); *see also Colston v. Barnhart,* 130 F.3d 96, 98 (5th Cir. 1997). "A genuine issue of material fact exists if a reasonable jury could enter a verdict for the nonmoving party." *Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). If the determination of qualified immunity would require the resolution of a genuinely disputed fact, then that fact is material and we lack jurisdiction over the appeal. *See Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 483 (5th Cir. 2001) ("[T]he threshold issue is whether the facts the district judge concluded are *genuinely disputed are also material.* If they are material, we lack jurisdiction.");

see also Estate of Starks v. Enyart, 5 F.3d 230, 232-33 (7th Cir. 1993) ("If . . . we cannot decide the qualified immunity question without resolving an issue of disputed fact, then we lack jurisdiction over the question. Therefore, if the record read favorably to the plaintiff supports a version of the facts which would not entitle the defendants to immunity, we will dismiss the interlocutory appeal for lack of jurisdiction." (citation omitted)).

Since we are limited solely to legal questions for this interlocutory appeal, we "are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris,* 550 U.S. 372, 127 S. Ct. 1769, 1774, 167 L. Ed. 2d 686 (2007) (quotation marks and alteration omitted). "Thus, a defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity 'must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal.'" *Freeman v. Gore,* 483 F.3d 404, 410 (5th Cir. 2007) (quoting *Gonzales v. Dallas County,* 249 F.3d 406, 411 (5th Cir. 2001)). If the defendant would still be entitled to qualified immunity under this view of the facts, then any disputed fact issues are not material, the district court's denial of summary judgment was improper, and we must reverse; otherwise, the disputed factual issues are material and we lack jurisdiction over the appeal.

We therefore adopt Lytle's version of the facts and make all reasonable inferences in his favor for

the purposes of this appeal. We assume that after the Taurus made the wide right turn and collided with the car in the oncoming lane, O'Donnell stopped his police cruiser behind it. The Taurus reversed course and began backing up toward O'Donnell's police cruiser in an effort to free itself from the collision. The Taurus then began to drive away and made it three or four houses down the block. At this point, there were no bystanders in the path of the vehicle, and, according to Lytle, neither the Taurus nor any of its occupants posed a threat of harm to O'Donnell or others. When the Taurus was three to four houses down the block, O'Donnell twice fired at it. O'Donnell did not issue a warning before firing and was not aiming for the driver or any other individual inside the Taurus. Although this account leaves several factual gaps, we make all reasonable inferences in Lytle's favor when filling those gaps.

Once we have narrowed the interlocutory appeal solely to issues of law, we review the district court's resolution of these issues de novo. *Ramirez v. Knoulton,* 542 F.3d 124, 128 (5th Cir. 2008); *Freeman,* 483 F.3d at 410.

III. DISCUSSION

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S.

800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). To determine whether a government official is entitled to qualified immunity for an alleged constitutional violation, we conduct the two-step analysis of *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Although *Saucier's* rigid "order of battle" – requiring courts to always address the constitutional issue of whether alleged conduct violated the constitution – is now advisory under *Pearson,* our ultimate conclusion that O'Donnell is not entitled to qualified immunity mandates a full *Saucier* inquiry. We therefore first ask the threshold "constitutional violation question" of whether, taking the facts in the light most favorable to the plaintiff, the officer's alleged conduct violated a constitutional right. *Id.* at 201. If we determine that the alleged conduct did not violate a constitutional right, our inquiry ceases because there is no constitutional violation for which the government official would need qualified immunity. *Id.* If, however, the alleged conduct amounts to a constitutional violation, then we ask the "qualified immunity question" of whether the right was clearly established at the time of the conduct. *Id.* Qualified immunity allows for officers to make reasonable mistakes about whether their conduct violates the law, and an officer's mistake is reasonable when there are insufficient indicia that the conduct in question was illegal. *See Freeman,* 483 F.3d at 415. "The relevant, dispositive inquiry in determining whether

a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S. Ct. 2151. If we answer both the constitutional violation and qualified immunity questions affirmatively, the officer is not entitled to qualified immunity.

Allegations that an officer used excessive force in conducting a seizure complicates the *Saucier* inquiry. This complexity stems from having to make two "overlapping objective reasonableness inquir[ies]." *Id.* at 210 (Ginsburg, J., concurring in the judgment). We must first answer the constitutional violation question by determining whether the officer's conduct met the Fourth Amendment's reasonableness requirement, as discussed below. If we find that the officer's conduct was not reasonable under the Fourth Amendment, we must then answer the qualified immunity question by determining whether the law was sufficiently clear that a reasonable officer would have known that his conduct violated the constitution. In other words, at this second step, we must ask the somewhat convoluted question of whether the law lacked such clarity that it would be reasonable for an officer to erroneously believe that his conduct was reasonable. Despite any seeming similarity between

these two questions, they are distinct inquiries under *Saucier,* and we must conduct them both.*

We therefore face two questions: (1) whether O'Donnell's alleged conduct violated Heather Lytle's constitutional rights, and if so, (2) whether those rights were clearly established at the time of the shooting. We address each in turn.

A. The Constitutional Violation

Lytle asserts that O'Donnell used excessive force when he fired at the Taurus, implicating his daughter's Fourth Amendment right to be free from an unreasonable seizure. The parties do not dispute that this claim is governed by the Fourth Amendment's requirement that a seizure be objectively reasonable, *see Graham v. Connor,* 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), or that Heather Lytle was "seized" within the meaning of the Fourth Amendment when O'Donnell's bullet struck her. The only remaining question, then, is whether O'Donnell's conduct was "objectively reasonable." *See Scott,* 127 S. Ct. at 1776; *Ramirez,* 542 F.3d at 128-29; *Bush v. Strain,* 513 F.3d 492, 501 (5th Cir. 2008).

---

* The Court in *Pearson* did not address *Saucier*'s other holding that, even in qualified immunity claims involving allegations of excessive force, we must still conduct two separate reasonableness inquiries.

1. Objective Reasonableness

Assessing the reasonableness of a police officer's use of force involves "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham,* 490 U.S. at 396, 109 S. Ct. 1865 (quoting *Tennessee v. Garner,* 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). This balancing "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* We judge the reasonableness of an officer's conduct "objectively," that is, without reference to the subjective intent or motivation that underlies the officer's conduct. *Id.* at 397. We must also look at the facts and circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. And we must account for the difficult and often split-second decisions that police officers must make in carrying out their duties. *Id.* at 396-97.

There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, "we must . . . slosh our way through the factbound morass of 'reasonableness.'" *Scott,* 127 S. Ct. at 1777-78; *see also id.* (rejecting "an easy-to-apply legal test in the Fourth Amendment context").

Moreover, the reasonableness of an officer's conduct under the Fourth Amendment is often a question that requires the input of a jury. This is not only because the jury must resolve disputed fact issues but also because the use of juries in such cases strengthens our understanding of Fourth Amendment reasonableness. As the Third Circuit stated in *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999),

> [R]easonableness under the Fourth Amendment should frequently remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of "reasonableness" is itself reasonable and widely shared.

Our standard of review on this interlocutory appeal – namely, whether a reasonable jury could enter a verdict for the non-moving party – emphasizes the importance of juries in cases of alleged excessive force. Indeed, we can find no constitutional violation when an officer's conduct, even viewed in the light most favorable to the plaintiff, falls into that category of conduct that is reasonable as a matter of law. In such cases, we would hold that no rational jury could find that the officer acted unreasonably. But in those cases where the officer's conduct is less clear and an assessment of reasonableness mandates a number of factual inferences, the case falls within the province of a jury. Thus, when determining whether the

officer's alleged conduct violated the constitutional right to be free from unreasonable seizures, we must remain mindful of the role that the jury can play in this determination.

This approach comports with the Supreme Court's decision in *Scott*. Granted, the *Scott* Court stated that, "[a]t the summary judgment stage, . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [a police officer's] actions . . . is a pure question of law." 127 S. Ct. at 1776 n.8 (citation omitted). Thus, when facts are undisputed and no rational factfinder could conclude that the officer acted unreasonably, we can hold that an officer acted reasonably as a matter of law. *See, e.g., Ramirez*, 542 F.3d at 128-31. But when facts are disputed and significant factual gaps remain that require the court to draw several plaintiff-favorable inferences, our analysis is more tentative. In these cases, we must consider what a factfinder could reasonably conclude in filling these gaps and then assume the conclusion most favorable to the plaintiff.

What this means for the present interlocutory appeal is that we can only find no constitutional violation if, even under the version of the facts most favorable to Lytle, O'Donnell's conduct was objectively reasonable. In such a case, no rational jury could conclude that O'Donnell violated the Fourth Amendment, and any genuinely disputed fact issues would be thus immaterial because their resolution would

not alter the ultimate conclusion. But if a factfinder *could* conclude that O'Donnell violated the constitution, we must move on to the qualified immunity question.

2. O'Donnell's Use of Force

O'Donnell asserts that his use of force was a reasonable response to the threat of harm that the Taurus posed to himself and the public. He further contends that this threat was ever-present, and thus suggests any dispute over the distance or direction that the Taurus had traveled was necessarily immaterial. In other words, according to O'Donnell, the threat that the Taurus posed was sufficiently grave whether the Taurus was immediately in front of him or four houses down the block. Therefore, O'Donnell argues, even if the disputed factual issues are resolved in favor of the plaintiff, he would still be entitled to qualified immunity, rendering any factual disputes immaterial.

O'Donnell misunderstands the issue, however, to be merely one of distance and direction. Although the district court noted this dispute in denying summary judgment, the remainder of its order reveals that resolution of this disputed fact is essential to determining whether the Taurus posed a threat of harm at the time O'Donnell fired and the reasonableness of any response thereto.

As the district court indicated, if the facts were as O'Donnell alleges – that is, he fired as or

immediately after the Taurus was backing up toward him – he would likely be entitled to qualified immunity. This is due to the threat of immediate and severe physical harm that the reversing Taurus likely posed to O'Donnell himself. As discussed below, however, the threat of harm was potentially much different under Lytle's version of the facts. O'Donnell is thus mistaken in asserting that the distance and direction the Taurus traveled are irrelevant *because* the Taurus always posed a threat. They are instead relevant to *whether* the Taurus posed a threat.

Further, because we must look at all of the facts and circumstances relevant to the reasonableness of O'Donnell's conduct, he is mistaken to focus entirely on the threat of harm. Even were we to agree with O'Donnell as to the threat the Taurus posed, we would be remiss not to consider O'Donnell's conduct in response to that threat. It is unclear how firing at the back of a fleeing vehicle some distance away was a reasonable method of addressing the threat. Indeed, there is some evidence in the record that O'Donnell had been previously informed of the potential danger and futility of shooting at a vehicle. Were a jury to accept Lytle's version of the facts, it might very well be troubled by O'Donnell's act of firing his sidearm at the back of a vehicle three or four houses down the block of a residential area when he was unlikely to have a shot at – and apparently was not aiming for – the driver. A jury might also find that O'Donnell's act of firing at a vehicle driving away from him in a residential area posed a risk that the shots might strike

an unintended target. Thus, even if we assumed that the Taurus posed a significant threat of harm, a jury could conclude that O'Donnell's conduct in response to that threat was unreasonable. In other words, under the plaintiff's version of the facts, O'Donnell's conduct itself weighs against a conclusion of reasonableness.

Moreover, we agree with the district court that the distance and direction that the Taurus had traveled is essential to determining the extent of the threat that the Taurus actually posed – to both O'Donnell and the public in general – at the time O'Donnell fired. O'Donnell points to several factors that he argues indicate the severity of the threat posed by the vehicle. There was, first, the threat of harm that the Taurus posed to O'Donnell himself as it was backing up toward him. Further, O'Donnell reasonably believed (1) that the driver of the Taurus was the same individual that was on bond for charges of felony theft and unlawfully carrying a weapon, and (2) that the driver was driving a stolen vehicle. O'Donnell also knew that the driver of the Taurus (1) had committed the felony of fleeing from a police officer, (2) had left a known drug location, (3) had led O'Donnell on a high-speed chase through a residential area with children playing somewhere nearby, (4) had collided with an occupied car while attempting to make a right turn, (5) had refused orders to stop, (6) had reversed the Taurus toward O'Donnell, and (7) was fleeing into the neighborhood.

As a preliminary matter, by the time the Taurus was three or four houses away, a jury could conclude that any immediate threat to O'Donnell had ceased. To be sure, the Taurus might have posed an immediate and significant threat of harm to O'Donnell when it was backing up toward him. But an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased. *See Abraham,* 183 F.3d at 294 ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Ellis v. Wynalda,* 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."); *see also Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."). Thus, even were we to assume that shooting at the Taurus was reasonable at the moment it was backing up toward O'Donnell, that does not necessarily make his firing at the vehicle when it was driving away from him equally reasonable.

O'Donnell retorts that the events unfolded so quickly that, even if the vehicle was driving away when he fired, he should not be faulted for failing to recognize that the threat to him had passed. O'Donnell is correct on the law. In *Hathaway v. Bazany,* 507 F.3d 312, 322 (5th Cir. 2007), a police officer who was on foot fired at a vehicle immediately after it struck

him. We determined that the vehicle, which had accelerated toward the officer after he had attempted to pull it over, posed such a threat to the officer that the use of deadly force was objectively reasonable even if the officer had fired immediately after the vehicle struck him. *Id.* We reasoned that the "extremely brief period of time" between when the car accelerated toward and struck the officer and the officer's firing of his weapon was insufficient for the officer to perceive "new information indicating the threat was past." *Id.* Under *Hathaway's* reasoning – and assuming that the Taurus posed a significant threat of harm to O'Donnell at that time – O'Donnell's conduct might be objectively reasonable if he fired *immediately* after the Taurus had backed up toward him.

Taking the facts in the light most favorable to the plaintiff, however, O'Donnell could have had sufficient time to perceive that any threat to him had passed by the time he fired. Although O'Donnell asserts that the time between the Taurus backing up toward him and the moment he fired was very brief, it was at least enough time for the Taurus to go from a full stop to a distance three or four houses down the block. Depending upon the width of the neighborhood lots and the Taurus's speed and acceleration, this interval could have been anywhere from three to ten seconds, perhaps even more. While the scant record at this point in the proceedings precludes any certainty regarding the amount of time this took, when drawing all reasonable inferences in the plaintiff's favor, we must assume that the Taurus backing up

toward O'Donnell and the shooting were not "in near contemporaneity." *Cf. id.* We must therefore infer that sufficient time might have passed for O'Donnell to perceive that the threat to him had ceased. Consequently, a jury could find that there was no threat to O'Donnell at the time of the shooting, and this lack of a threat weighs against a conclusion of reasonableness.

Turning to the other indicia of the threat the Taurus posed to the public in general, O'Donnell asserts that it is only reasonable to conclude that the Taurus was a clear menace. Invoking the Supreme Court's statement in *Scott* that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death," 127 S. Ct. at 1779, O'Donnell argues that the threat that the fleeing Taurus posed to the public renders his use of force objectively reasonable.

In *Scott,* the Court held that an officer's use of force to stop a fleeing motorist was reasonable in part because the suspect posed "an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.* at 1778. In the words of the Court, the suspect engaged in "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 1775-76; *see also id.* at 1778 (characterizing the pursuit as a

"reckless, high-speed flight" that stretched nearly ten miles). The Court thus concluded that "[t]he car chase that [the suspect] initiated . . . posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise." *Id.* at 1779. For this reason and others, the Court held that the officer's use of force in *Scott* was objectively reasonable. *Id.*

Although it stated that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death," *id.*, the Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles. As Justice Ginsburg pointed out in her concurrence, *Scott* did not "articulat[e] a mechanical, *per se* rule." *Id.* at 1779 (Ginsburg, J., concurring).

> The inquiry described by the Court is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?

Id. (citation omitted). Indeed, the reasoning of *Scott* itself – requiring courts to "slosh [their] way through the factbound morass of 'reasonableness,'" *id.* at 1778 (majority opinion) – belies such a *per se* approach. Consequently, the Taurus's flight does not *necessarily* render O'Donnell's conduct objectively reasonable.

Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable.

For example, in *Cole v. Bone,* 993 F.2d 1328, 1330-31 (8th Cir. 1993), a police officer shot the driver of an eighteen-wheeler after the suspect led police on a fifty-mile chase exceeding speeds of ninety miles per hour, passed traffic on both shoulders, attempted to ram several police cruisers, ran a road block, and forced over one hundred vehicles out of its way. The Eighth Circuit held that the officer's conduct was reasonable because the officer was justified in believing that "the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves." *Id.* at 1333. Similarly, in *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 487 (6th Cir. 2007), the Sixth Circuit found the shooting of a fleeing motorist to be objectively reasonable. After the suspect's vehicle collided with a police cruiser, one officer approached the driver's window and stuck his gun into the vehicle, pointing it at the suspect's head. *Id.* at 484. The suspect began to drive away, knocking the officer to the ground. *Id.* The court in *Williams* found a second officer's shooting of the driver to be objectively reasonable based upon the threat that the driver posed to both the downed officer and the public. *Id.* at 487. And in *Abney v. Coe,* 493 F.3d 412, 418 (4th Cir. 2007), the Fourth Circuit held that an officer's conduct was reasonable where

the officer stopped a suspect fleeing on a motorcycle by ramming the suspect with his police cruiser. The court found "abundant and uncontradicted evidence" that the suspect posed a substantial threat of harm to the public, including the fact that the suspect led police on an eight mile chase during "which he committed numerous dangerous traffic violations" and ran another motorist off the road. *Id.* at 416-17. This threat of harm rendered the officer's conduct objectively reasonable. *Id.* at 418; *see also Long v. Slaton,* 508 F.3d 576, 580-81 (11th Cir. 2007), *cert. denied,* 129 S. Ct. 725, 172 L. Ed. 2d 725 (2008); *Beshers v. Harrison,* 495 F.3d 1260, 1268 (11th Cir. 2007); *Martin v. Dishong,* 102 F. App'x 780, 782-83 (4th Cir. 2004) (per curiam); *Vanvorous v. Burmeister,* 96 F. App'x 312, 314 (6th Cir. 2004) (per curiam); *Scott v. Clay County,* 205 F.3d 867, 878 (6th Cir. 2000); *Smith v. Freland,* 954 F.2d 343, 347 (6th Cir. 1992).

In contrast, a number of courts have found police officers' shooting of fleeing motorists to be unreasonable – or at least potentially so, for the purposes of qualified immunity appeals – where the driver posed a lesser risk of harm to others. For example, in *Adams v. Speers,* 473 F.3d 989, 991 (9th Cir. 2007), a suspect had led police on a chase, "largely within the speed limit," for over an hour. An officer twice rammed the suspect's vehicle and later, without warning, shot and killed the suspect as the suspect's vehicle rolled away. *Id.* at 991-92. The Ninth Circuit found it "obvious" that "[n]o officer acting reasonably in these circumstances could have believed that he could use

deadly force to apprehend" the suspect. *Id.* at 993-94. Similarly, in *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005), a police officer shot a suspect after the suspect had stolen the officer's police cruiser and began to drive away. The Sixth Circuit recognized that a suspect fleeing in a stolen police cruiser posed some danger to the public but held that the danger "was not so grave as to justify the use of deadly force." *Id.* at 773. As the plaintiff's version of the facts did not mention any bystanders "whose physical safety could have been endangered by [the suspect's] actions," *id.* at 774, the court held that a jury would "be entitled to determine that [the police officer's] use of force was unreasonable and accordingly unconstitutional," *id.* at 775. And in *Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (11th Cir. 2003), a police officer shot a passenger in a fleeing vehicle after a suspect had led police on a highway chase exceeding eighty miles per hour and had collided with a police cruiser. The Eleventh Circuit found that "[g]enuine issues of material fact remain[ed] as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot." *Id.* at 1330. Since the suspects in *Vaughan* were little more than "suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture, . . . a reasonable jury could find that [the suspects'] escape did not present an immediate threat of serious harm to [the police officer] or others on the road." *Id.*; *see also Tubar v. Clift*, 286 F. App'x 348, 351 (9th Cir. 2008)

(mem.); *Kirby v. Duva*, 530 F.3d 475, 482-83 (6th Cir. 2007); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 346 (6th Cir. 2007); *Jones v. City of Atlanta*, 192 F. App'x 894, 897 (11th Cir. 2006) (per curiam); *Sigley v. City of Parma Heights*, 437 F.3d 527, 536 (6th Cir. 2006); *Cowan ex rel. Cooper v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003); *Lewis v. Boucher*, 35 F. App'x 64, 69-70 (4th Cir. 2002) (per curiam); *Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000); *McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999); *Abraham*, 183 F.3d at 294-95; *Starks*, 5 F.3d at 233.

As these decisions indicate, a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable. In assessing the reasonableness of a police officer's use of force, we must instead delve into the facts and circumstances of each case.

Taking the facts of the present case in the light most favorable to Lytle, a jury could conclude that the Taurus posed some threat of harm; the chase took place at high speeds within a residential area, there were children playing somewhere nearby, and the Taurus had collided with another vehicle. But we do not agree with O'Donnell that the Taurus was so menacing under Lytle's version of the facts that any use of force in an attempt to stop it would be objectively reasonable as a matter of law. A jury accepting Lytle's version of the facts could conclude that the Taurus did not pose a sufficient threat of harm such that the use of deadly force was reasonable.

O'Donnell had pursued the Taurus for only a quarter-to-half mile before the shooting occurred, raising a question of whether O'Donnell had sufficient indicia to conclude that the Taurus posed such a threat of harm. Also, there were no children or bystanders in the path of the vehicle, indicating that no one was in immediate danger. The Taurus's collision with the oncoming vehicle while making a wide right turn does give us some pause, but we think the jury should assess the depravity that this collision evidenced. Thus, while any threat of harm to the public would weigh in favor of finding O'Donnell's conduct reasonable, the threat was not so great under Lytle's version of the facts that O'Donnell's conduct is beyond question.

When we consider the totality of the circumstances, we conclude that O'Donnell's conduct may not have been objectively reasonable. A rational jury could conclude that the Taurus did not pose an especially significant threat of harm such that the use of deadly force was justified. Further, when weighing the threat of harm posed by the Taurus against O'Donnell's chosen course of conduct – firing at the back of the vehicle from some distance – the jury could conclude that O'Donnell's conduct was not a reasonable response to any threat.

We emphasize this last point: the facts in this interlocutory appeal merely indicate that O'Donnell's conduct is not beyond question. We are holding only that a jury considering all relevant circumstances – O'Donnell's conduct, the threat of harm to O'Donnell

and the public, etc. – could determine that O'Donnell acted unreasonably. The meager record at this point of the proceedings has mandated a number of inferences, and the factual assumptions on which we have decided this appeal might bear little resemblance to what the factfinder ultimately determines. But it is the job of the factfinder, not this court, to ultimately resolve the factual disputes and make the inferences that fill the gaps in the facts. On an interlocutory appeal, we are limited to assuming that any and all questions are resolved in the plaintiff's favor, tempered by the limits of reasonableness. We therefore conclude that a jury could determine that O'Donnell acted unreasonably in firing at the back of the Taurus and thus violated Heather Lytle's constitutional rights. This is sufficient to affirmatively answer the constitutional violation question of our inquiry. We thus turn to the question of whether those rights were clearly established at the time of the incident.

B. The Clearly Established Right

At the second step of the qualified immunity inquiry, we ask whether the violated constitutional right was clearly established at the time of the violation. When conducting this inquiry, "[t]he central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue

violated constitutional rights.'" *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer,* 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "Thus, while the right to be free from excessive force is clearly established in a general sense, the right to be free from the degree of force employed in a particular situation may not have been clear to a reasonable officer at the scene." *Bush,* 513 F.3d at 502 (citing *Saucier,* 533 U.S. at 201-02).

We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. *See Kirby,* 530 F.3d at 483-84. This holds as both a general matter, *see Garner,* 471 U.S. at 11-12, and in the more specific context of shooting a suspect fleeing in a motor vehicle, *see, e.g., Kirby,* 530 F.3d at 484; *Vaughan,* 343 F.3d at 1332-33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question of our inquiry.

We therefore hold that, were a jury to accept Lytle's version of the facts, it could conclude that O'Donnell had violated Heather Lytle's clearly established constitutional right to be free from an unreasonable seizure. Because Lytle's version of disputed facts permits a decision adverse to O'Donnell, the district court was correct to conclude that O'Donnell's entitlement to qualified immunity turns

on the resolution of these factual issues. These disputed factual issues are thus material as to whether O'Donnell is entitled to qualified immunity, and we consequently lack jurisdiction over this interlocutory appeal.

IV. CONCLUSION

We agree with the district court that O'Donnell's entitlement to qualified immunity turns on genuine issues of material fact that the factfinder must resolve. We therefore DISMISS O'Donnell's interlocutory appeal for a lack of jurisdiction.

DISMISSED.

DISSENT BY: JERRY E. SMITH

DISSENT

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent. The majority errs, primarily in light of *Scott v. Harris,* 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The situation faced by the officers in *Scott* and the instant case are not different in any way that should make a difference. *Scott* is the clearly-established law that governs here for purposes of the qualified immunity analysis.

As the majority states, we base our analysis on the facts that are undisputed and on the disputed

facts as alleged by the plaintiff. Majority op. at 4-5. The majority admits that Officer O'Donnell "would likely be entitled to qualified immunity" if, as he claims, "he fired as or immediately after the Taurus was backing up toward him." *Id.* at 10. But Lytle contends, to the contrary, that, as the majority describes it, "the Taurus was three or four houses down the block when O'Donnell fired." *Id.* at 3. The question is whether that disputed issue of fact – albeit genuine – is material. *See id.* at 4. It is not.

The majority goes astray in diminishing the importance of the threat to others, including not only the officers but also pedestrians, the occupants of vehicles, and even the occupants of nearby buildings. The majority errs in criticizing the fact that in his brief, O'Donnell "focus[es] entirely on the threat of harm." *Id.* at 11.

In *Scott,* the Court, quite properly, focused on that threat – on what it termed "the extreme danger to human life posed by [the suspect]." *Scott,* 550 U.S. at 383. Addressing the statement in *Tennessee v. Garner,* 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), that, under the Fourth Amendment, "the fleeing suspect must have posed an immediate threat of serious physical harm to the officer or others," the *Scott* Court relied on the fact that "it was [the suspect's] flight itself (by means of a speeding automobile) that posed the threat of 'serious physical harm . . . to others.'" *Scott,* 550 U.S. at 382 n.9 (quoting *Garner,* 471 U.S. at 11).

We return, therefore, to the question whether, accepting Lytle's version of the facts, the threat to life and safety was sufficient to justify use of deadly force. The majority accurately sets forth

> several factors that [O'Donnell] argues indicate the severity of the threat posed by [the suspect's] vehicle. There was, first, the threat of harm that the Taurus posed to O'Donnell himself as it was backing up toward him. Further, O'Donnell reasonably believed (1) that the driver of the Taurus was the same individual that was on bond for charges of felony theft and unlawfully carrying a weapon, and (2) that the driver was driving a stolen vehicle. O'Donnell also knew that the driver of the Taurus (1) had committed the felony of fleeing from a police officer, (2) had left a known drug location, (3) had led O'Donnell on a high-speed chase through a residential area with children playing somewhere nearby, (4) had collided with an occupied car while attempting to make a right turn, (5) had refused orders to stop, (6) had reversed the Taurus toward O'Donnell, and (7) was fleeing into the neighborhood.

Majority op. at 11-12.

For purposes of summary judgment, we cannot credit O'Donnell's disputed claim that the Taurus was backing toward him. The other facts, however, are not contested, and they closely mirror the considerations addressed in *Scott,* in which the Court asked whether,

> consistent with the *Fourth Amendment*, [an officer can] attempt to stop a fleeing motorist from continuing his public-endangering flight. . . . Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death on order to stop the motorist's flight from endangering the lives of innocent bystanders?

Scott, 550 U.S. at 374. The Court answered that question in the affirmative:

> Deputy Scott did not violate the *Fourth Amendment*. . . . [The suspect] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. . . . A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the *Fourth Amendment*, even when it places the fleeing motorist at risk of serious injury or death.

Id. at 381, 384, 386.

The same result is called for here. It makes no difference if the dangerous suspect was three or four houses away instead of backing toward the officer. The obvious risk to the public was the same, as was the need for the officer to take action. The blame for the passenger's death falls squarely on the suspect, not the officer, who had no intention of hitting an innocent occupant of the Taurus with his shot.

Officer O'Donnell did not violate the Fourth Amendment. We should not ask "whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." *Hunter v. Bryant,* 502 U.S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). O'Donnell is entitled to qualified immunity, because his "decision was reasonable, even if mistaken." *Id.* at 229. His actions, despite their unfortunate and unintended consequences, were not unreasonable.

"[N]o reasonable jury could conclude otherwise." *Scott,* 550 U.S. at 386. I respectfully dissent.

ERNEST LYTLE, Individually and as Representative of the ESTATE OF HEATHER LYTLE, DECEASED, Plaintiff, vs. BEXAR COUNTY, TEXAS, BEXAR COUNTY SHERIFF'S OFFICE, ROBERT O'DONNELL, in his Individual Capacity, Defendants.

Cause No. SA-07-CA-0195-XR

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

543 F. Supp. 2d 656

February 14, 2008, Decided
February 14, 2008, Filed

COUNSEL: For Ernest Lytle, Individually and as Representative of the Estate of Heather Lytle, Deceased, Plaintiff: James Allon Hall, Sonia M. Rodriguez, LEAD ATTORNEYS, Branton & Hall, P.C., San Antonio, TX.

For Bexar County, Texas, Bexar County Sheriff's Office, Robert O'Donnell, in his Individual Capacity, Defendants: Clarkson F. Brown, LEAD ATTORNEY, Texas County Criminal District Attorney's Office, Civil Division, San Antonio, TX.

JUDGES: XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: XAVIER RODRIGUEZ

OPINION

ORDER

On this date, the Court considered Defendants' Motion to Dismiss (Docket No. 26), as well as Plaintiff's Response (Docket No. 29). After having reviewed the pleadings and evidence therein, the Court **DENIES** in part, and **GRANTS** in part Defendants' Motion.

Facts

This case comes before the Court following a tragic sequence of events that unfolded on February 28, 2006 in San Antonio, Texas. On that day, Defendant Robert O'Donnell ("O'Donnell"), a Deputy for Defendant Bexar County Sheriff's Office, was in search of a Ford Taurus. O'Donnell located a Ford Taurus ("suspect vehicle") matching the description, followed the suspect vehicle, and observed the suspect vehicle violate a traffic law. Thereafter, O'Donnell activated his emergency lights, and the suspect vehicle, driven by Charles Judy, not only failed to stop, but accelerated away from O'Donnell's patrol car. Subsequently, the suspect vehicle, in which 15-year old Heather Lytle was one of three passengers, attempted to turn onto an adjacent street, where it ran into another vehicle ("bystander vehicle"). O'Donnell pulled his patrol car behind the suspect vehicle. The suspect vehicle reversed, before switching

gears and fleeing away.[1] At some point during the confusion that followed the suspect vehicle's collision with the bystander vehicle, O'Donnell discharged his service weapon more than one time.[2] One of the bullets from O'Donnell's weapon penetrated the suspect vehicle and struck Heather Lytle, who died from the wound she received.

Analysis

A. Motion Decided as Motion for Summary Judgment

Although styled as a motion to dismiss, which would implicate analysis under Rule 12(b)(6), Defendants' motion incorporates evidence outside of the pleadings. This Court, having considered the evidence presented by both Defendants and Plaintiff, disposes of the motion as provided in Rule 56.[3]

---

[1] The parties dispute whether the suspect vehicle reversed into Deputy O'Donnell's vehicle before speeding off, or just reversed toward him without making contact.

[2] The parties strenuously disagree as to whether O'Donnell fired before or after the suspect vehicle began to flee again.

[3] If on a 12(b)(6) motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." FED. R. CIV. P. 12(b).

B. Summary Judgment Standard

The Federal Rules provide that summary judgment "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."[4] The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact."[5] Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must present evidence setting forth "specific facts showing a genuine issue for trial."[6] The trial court must resolve all reasonable doubts about the facts in favor of the nonmovant.[7]

---

[4] FED. R. CIV. P. 56(c).

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[6] FED. R. CIV. P. 56(e)(2).

[7] *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 456 (5th Cir. 2005).

Plaintiff's Allegations

By his First Amended Complaint (Docket No. 15), Plaintiff alleges four separate Counts against various combinations of the Defendants. Count I alleges the use of excessive force in violation of Fourth Amendment right to be free from unreasonable seizure by O'Donnell, in his individual capacity, Bexar County, Texas, and the Bexar County Sheriff's Office.[8] Count II alleges violation of Heather Lytle's constitutional rights by Bexar County, Texas and the Bexar County Sheriff's Office pursuant to a custom or policy of these two governmental entities.[9] Count III alleges violation of Heather Lytle's constitutional rights by Bexar County, Texas and the Bexar County Sheriff's Office due to inadequate training.[10] Count IV alleges that Defendants are liable pursuant to the Texas Tort Claims Act ("TTCA") due to the negligent use of tangible personal property.[11]

Count I – Excessive Force

A. Defense of Qualified Immunity

Defendant O'Donnell asserts qualified immunity as a defense to Plaintiff's claim of excessive force. *Saucier v. Katz* provides the analytical structure in

---

[8] Docket No. 15 at 3.

[9] *Id.* at 4.

[10] *Id.*

[11] *Id.* at 5.

which a claim of qualified immunity should be considered.[12] According to *Saucier,* the initial inquiry for the Court is whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[13] If a constitutional "violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."[14] It is important to note that this inquiry "must be undertaken in light of the specific context of the case, not as abroad general proposition."[15] Indeed, "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[16]

Following the *Saucier* structure, the first step for the Court is to determine whether Plaintiff has pled facts that, if true, would establish that Defendant O'Donnell violated a constitutional right. Plaintiff alleges the actions of Defendant O'Donnell constituted excessive force in violation of Heather Lytle's Fourth Amendment rights to be secure against unreasonable searches and seizures. According to the

---

[12] 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

[13] *Id.* at 201.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 202.

Supreme Court in *Graham v. Connor*, in evaluating, for Fourth Amendment purposes, the reasonableness of a particular use of force, the Court must pay "careful attention to the facts and circumstances . . . including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[17]

According to Plaintiff's First Amended Complaint, O'Donnell violated Heather Lytle's Fourth Amendment rights when he allegedly utilized excessive force by shooting at the suspect vehicle as that vehicle was attempting to flee.[18] It is unquestionable that the use of deadly force by O'Donnell implicated Heather Lytle's Fourth Amendment constitutional right to be free from unreasonable seizure.

The inquiry next turns to whether the rights allegedly violated were clearly established. In other words, would it be "clear to a reasonable officer" that the Defendant's conduct was unlawful in the situation he confronted.[19] As the Supreme Court has noted, "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts . . . If the officer's mistake as to what the law requires is

---

[17] 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

[18] Docket No. 15 at 3.

[19] *Saucier*, 533 U.S. at 202.

reasonable . . . the officer is entitled to the immunity defense."[20]

To address this issue, it must be determined whether, given the totality of the circumstances, a reasonable officer confronted with the same situation as O'Donnell would recognize his actions were unlawful. The Supreme Court has made it clear that the use of deadly force to prevent escape is not unreasonable when an officer has probable cause to believe the suspect presents a threat of serious harm to the officer or others.[21] This Court recognizes the deference due to police officers, who must sometimes make instantaneous decisions which entail serious consequences. The Fifth Circuit has provided the following advice to courts evaluating such situations:

> "[Courts] must avoid substituting [their] personal notions of proper police procedure for the instantaneous decision of the officer at the scene. [Courts] must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."[22]

---

[20] *Id.* at 205.

[21] *Garner*, 471 U.S. at 11.

[22] *Stroik v. Ponseti*, 35 F.3d 155, 158-59 (5th Cir. 1994) (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)).

According to Plaintiff's pleadings and evidence, the suspect vehicle was moving rapidly away from O'Donnell when he fired his weapon.[23] In fact, construing the evidence most favorably toward Plaintiff, the suspect vehicle was possibly "three or four houses" away from O'Donnell when the shots were fired.[24] To the contrary, Defendant O'Donnell contends the suspect vehicle was either moving towards him, or had just impacted his patrol car when he fired the shots.[25]

If the facts are as Defendant has alleged, qualified immunity would attach to Deputy O'Donnell's actions, and Plaintiff's suit would be barred. Because this is a summary judgment analysis, however, a genuine issue of material fact exists regarding the direction and distance the suspect vehicle had traveled when Deputy O'Donnell discharged his weapon. Thus, this factual dispute must be resolved before the trier of fact. Because a determination of qualified immunity hinges on the resolution of this factual dispute, the Court **DENIES** O'Donnell's Motion to Dismiss (Docket No. 26) Count I.

---

[23] Docket No. 15 at 3. *See also*, Docket No. 29 at 2.

[24] Docket No. 29 at 2, n1.

[25] Docket No. 26 at 5-7.

Count II – Official Custom or Policy

Under § 1983, to recover from a governmental entity based on the theory of official policy or custom, a plaintiff must demonstrate "(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)."[26]

The first prong, the existence of a custom or policy, can be established in two ways. First, it can be shown by a policy statement, regulation, or official position adopted by policymakers that resulted in the plaintiff's injury.[27] Plaintiff does not specify any policy statement, regulation or official position. Accordingly, it appears that Plaintiff relies on the second method, which requires showing

> "[a] persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that

---

[26] *Castro v. McCord*, 259 Fed. Appx. 664, 2007 U.S. App. LEXIS 29277, 2007 WL 4467566 at *4 (5th Cir. 2007) (citations omitted).

[27] *Id.*

body had delegated policy-making authority."[28]

However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy."[29]

Plaintiff's First Amended Complaint makes the conclusory allegation that an official policy or custom of Bexar County, Texas and the Bexar County Sheriff's Office was the cause in fact and proximate cause of the supposed deprivation of Heather Lytle's constitutional rights.[30] Summary judgment can be supported by statements of fact in a pleading, but only where such a pleading is verified.[31] However, Plaintiff's First Amended Complaint is not verified. Accordingly, the factual allegations found in Plaintiff's First Amended Complaint are not competent summary judgment proof.[32]

Additionally, Plaintiff's Response to Defendants' Motion to Dismiss asks "the Court to take judicial notice of the pleadings and claims" made in a pending

---

[28] *Id.*

[29] *Id.* (citing *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)).

[30] Docket No. 15 at 4.

[31] *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1987) (citations omitted).

[32] See *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) ("Neither 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the nonmovant's [summary judgment] burden.").

case which allegedly involves an incident similar to the one at bar.[33] As in the instant case, the pleadings in the case Plaintiff references are not verified, making them incompetent summary judgment proof.

Plaintiff has wholly failed to provide competent summary judgment evidence on this issue of custom, policy or ratification. As such, the Court **GRANTS** Defendants' Motion to Dismiss Count II.

Count III – Inadequate Training

The Court is of the opinion that Defendants inadequately briefed the issue presented in Count III, and failed to produce evidence supporting their contentions. Plaintiff alleges discovery is ongoing with regards to Deputy O'Donnell's training file.[34] Because discovery is not yet complete, the Court **DENIES** Defendants' Motion to Dismiss Count III, **WITHOUT PREJUDICE**. The Court invites the Parties to readdress the issues concerning Count III once discovery is complete.

Count IV – Negligence

The TTCA provides that a municipality, such as a county government, is liable for death resulting from the negligent acts of the governmental unit's employees acting within the scope of their employment

---

[33] Docket No. 29 at 15.

[34] *Id.*

when such injuries result from the use of tangible personal property.[35] When such a situation occurs, the governmental unit has waived its right to sovereign immunity. However, the TTCA provides for an exception from waiver of sovereign immunity when the act complained of is an intentional tort.[36] Therefore, if the facts construed favorably towards the Plaintiff show that Deputy O'Donnell's act of discharging his weapon was unintentional, Bexar County, Texas and Bexar County Sheriff's Office have waived sovereign immunity.

Plaintiff suggests that Deputy O'Donnell's discharge of his weapon was not intentional because he did not specifically intend to injure Heather Lytle.[37] Plaintiff proposes that Deputy O'Donnell's actions were not intentional because he pointed his weapon at the suspect vehicle, not intending to shoot Heather, and that he did not shoot at any particular individual.[38] Plaintiff cites to *Pineda v. City of Houston*[39] and *Escobar v. City of Houston*[40] to support his theory that the element of intent is determined by whether the actor intends to shoot the victim and whether it is

---

[35] TEX. CIV. PRAC. & REM CODE § 101.021.

[36] TEX. CIV. PRAC. & REM CODE § 101.057(2).

[37] Docket No. 29 at 12-14.

[38] *Id.*

[39] 175 S.W.3d 276, 283 (Tex.App. – Houston [1st Dist.] 2004, no pet.).

[40] 2007 U.S. Dist. LEXIS 72706, 2007 WL 2900581, at *43 (S.D. Tex. Sept. 29, 2007).

reasonably foreseeable a specific victim would be shot.[41]

Plaintiff incorrectly argues that the requisite intent is to injure a specific person. The Texas Supreme Court has stated "[t]he fundamental difference between negligent injury . . . and intentional injury is the specific intent to inflict *injury.*"[42] In fact, "intent to injure can be inferred from the actors' conduct."[43] "Intent is established when facts demonstrate that the actor desired to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."[44] In finding the act complained of was intentional, the *Pineda* Court noted that the Plaintiff did "not allege an accidental shooting, such as the inadvertent discharge of pistol."[45] This language indicates the court noted a distinction between an unintentional discharge and an intentional discharge. The distinction is that a discharge of a weapon caused by accident or inadvertence is an unintentional act; whereas the deliberate discharge of a weapon is an intentional act.

---

[41] Docket No. 29 at 11.

[42] *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985) (emphasis added).

[43] *Pineda*, 175 S.W.3d at 283.

[44] *Id.* at 283 n. 7 (citing RESTATEMENT 2d OF TORTS § 8(a) (1965)).

[45] *Id.* at 283.

The Court must decide whether Deputy O'Donnell intended to cause injury when he discharged his weapon. For the purposes of our inquiry, the timing of Deputy O'Donnell's shots is immaterial. Evaluating the evidence favorably towards the Plaintiff, it is undisputed that Deputy O'Donnell intentionally discharged his weapon. He discharged his weapon on his own volition, and no other factors contributed to his firing of the weapon. The specific intent to cause injury is limited to the intent to cause injury, and does not include intent to injure a specific person. It would prove to be too high of a burden if the intent needed to prove an intentional tort was the intent to not only cause injury, but to inflict that injury on a specific person. The fact that Deputy O'Donnell intended to shoot his weapon, with the intent to cause injury, satisfies the intent requirement for an intentional act.

Because the Court finds the actions of Deputy O'Donnell were intentional, the Court **GRANTS** Defendant's Motion to Dismiss Count IV as to all Defendants.

Conclusion

For the foregoing reasons, the Court: (1) **DENIES** O'Donnell's Motion to Dismiss Count I; (2) **GRANTS** Defendants' Motion to Dismiss Count II; (3) **DENIES** Defendants' Motion to Dismiss Count III, subject to re-urging at the completion of

discovery; and (4) **GRANTS** Defendants' Motion to Dismiss Count IV as to all Defendants.

It is so ORDERED.

SIGNED this 14th day of February, 2008.

/s/ Xavier Rodriguez
XAVIER RODRIGUEZ
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50217

ERNEST LYTLE, Individually and as Representative of the Estate of Heather Lytle, Deceased

Plaintiff-Appellee

v.

BEXAR COUNTY TEXAS
BEXAR COUNTY SHERIFF'S OFFICE
ROBERT O'DONNELL, in his Individual Capacity

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Oct. 6, 2009)

(Opinion 2/23/09, 5 Cir., 560 F.3d 404)

Before SMITH, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing is DENIED. The court was polled at the request of one of the members of the court. A majority of the judges, who

are in regular active service and not disqualified, not having voted in favor of rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the Petition for Rehearing En Banc is likewise DENIED.

Voting for en banc rehearing were: Chief Judge Edith H. Jones, Judge Jerry E. Smith, Judge Edith B. Clement, Judge Priscilla Owen and Judge Jennifer W. Elrod. Voting against en banc rehearing were: Judge Carolyn Dineen King, Judge E. Grady Jolly, Judge W. Eugene Davis, Judge Jacques L. Wiener, Jr., Judge Emilio M. Garza, Judge Fortunato P. Benavides, Judge Carl E. Stewart, Judge James L. Dennis, Judge Edward C. Prado, Judge Leslie H. Southwick, and Judge Catharina Haynes.*

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R. APP. P. 41(b).

ENTERED FOR THE COURT:

/s/ Edward C. Prado
Edward C. Prado
United States Circuit Judge

* At its most recent court meeting, the court voted to identify the judges voting for or against en banc rehearing where a poll is taken and the request for en banc rehearing is defeated.